Before the
Federal Maritime Commission

AMERICAN WAREHOUSING OF NEW YORK, INC.	)	
	)	
Complainant,	)	Docket Nos. 04-09
	)	05-03
- against -	)	
	)	
THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY,	)	**Oral Argument**
	)	**is Requested**
	)	
Respondent.	)	

COMPLAINANT'S EXCEPTIONS AND BRIEF

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INTRODUCTION

By these proceedings, American Warehousing of New York, Inc. ("AWI") seeks reparations and other relief against the Port Authority of New York and New Jersey (the "PA") for multiple violations of the Shipping Act. In two complaints, AWI articulates three basic claims:

> (i) the PA, in violation of §1709(b)(10) of title 46, unreasonably refused to negotiate with AWI, a marine terminal operator ("MTO"), by refusing to consider negotiating a long-term lease with AWI for Pier 7;
>
> (ii) the PA, in violation of §1709(d)(4) of title 46, discriminated against AWI, by favoring its competitors and other similarly-situated MTOs, in terms of leasing arrangements, capital improvements, marketing and promotion, and other critical aspects of marine terminal operations; and
>
> (iii) the PA, in violation of §1709(d)(4) of title 46, acted in bad faith and caused AWI to suffer undue prejudice, not only through the above discriminatory practices, but also by actively sabotaging AWI's operations and business.

In its answers, the PA never denied its refusal to negotiate, but claimed that its decision not to do so was reasonable, alleging a single affirmative defense: that AWI had been a bad tenant by purportedly refusing to pay rent on time and supposedly "squatting" illegally on other property owned by the PA ("Rent/Squatting Defense"). As for its discrimination, the PA, again, did not dispute the facts, but asserted the affirmative defense that its conduct was justified by a legitimate transportation factor. And, as for bad faith and undue prejudice, the PA denied the allegations.

In his initial decision ("ID"), the Administrative Law Judge ("ALJ") agreed with the essential tenets of each of AWI's claims. Specifically, the ALJ found that the PA refused to negotiate, and further concluded that the PA's Rent/Squatting Defense was bogus because the alleged conduct by AWI (even if true) could not possibly have occurred until after the decision not to negotiate had already been made. Amazingly, despite making these findings, the ALJ recommended ruling against AWI, asserting that the PA was justified in refusing to negotiate because the PA supposedly had a

"concern" about AWI's finances. This supposed "concern" related to an alleged need for financial assistance for a container barge.

As demonstrated below, the ALJ's ruling on this issue cannot stand for multiple reasons. First, even assuming that it were true that AWI's financial prospects hinged on financial assistance for a barge (and they did not), the PA never introduced any evidence suggesting that its refusal to negotiate was based upon financial concerns in general, or the barge expense in particular. Indeed, the only PA witness to provide specific testimony on its reason for refusing to negotiate stated that the PA relied exclusively on the Rent/Squatting Defense -- not any purported financial questions. It was the PA's attorney, in his post-trial brief, who, for the first time, raised an alleged financial "concern" as an alternate explanation for the refusal to negotiate (and even then, he never mentioned the barge). The ALJ's acceptance of an alternate explanation proffered by the PA's attorney after trial, in lieu of (and in contradiction to) the testimony of the PA's own witnesses, and then, as discussed infra, the ALJ's modification of opposing counsel's alternate explanation, relying upon assertions of fact neither party ever advanced during these proceedings, was counterintuitive, violative of the Commission's decisions, and, with all due respect, clearly erroneous.

Second, the ALJ relied upon a single document -- a stale business plan (the "January 2001 Plan") prepared by a consultant to American Stevedoring, Inc. ("American Stevedoring") not AWI -- to support the unpled, eleventh-hour, financial "concern" defense (the "Unpled 11th Hour Defense"). The PA's own attorney objected to the admission of this document (along with several others), asserting that they were "so totally irrelevant" that he "didn't care about them anyway" (Tr. 775-76).[1] Since this document was "irrelevant" to the PA's position, it could not possibly have factored into the PA's refusal to negotiate. Indeed, the PA introduced no evidence whatsoever that it even knew

[1] All references to the trial transcript shall be "Tr." followed by a page number (i.e. "Tr. _").

about AWI's alleged financial situation or prospects, or had ever seen the January 2001 Plan, at the time of the decision to refuse to negotiate. Moreover, the ALJ delayed admitting the January 2001 Plan into evidence until after post-trial briefing had been completed, thereby depriving AWI of the opportunity to address it.

Third, the ALJ conflated the discrimination and refusal to deal claims and then "found" that AWI's supposed "need" for financial assistance for the container barge provided the PA with both a reasonable business justification and a legitimate transportation factor, excusing the PA's behavior, warranting rejection of both claims. As demonstrated below, the ALJ's findings on this issue are wrong on the facts and the law. Among other things, AWI's projected financials in the January 2001 Plan reflected a growing profit, not a loss as the ALJ concluded. Furthermore, AWI, as a breakbulk operation, did not use the container barge; it was cross-harbor service that benefited AWI's affiliate, American Stevedoring. The ALJ, in relying on the January 2001 Plan, completely missed the boat on this issue.[2]

As for the discrimination claim, the ALJ ruled, in effect, that every area of the port has distinguishing characteristics based upon location, configuration, proximity to destinations (etc.,), and that the Commission does not have the jurisdiction to determine whether those characteristics justify discriminatory conduct. In essence, the ALJ concluded that the Shipping Act does not permit the Commission to evaluate the quality of decision-making by port authorities in the context of disparate treatment, as long as there exist size, location and configuration differences between the complainant and its MTO competitors and others similarly situated.

As demonstrated below, the ALJ's construction of the Shipping Act is inconsistent with its

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[2]Indeed, the ALJ even mis-identified the January 2001 Plan as Exhibit 21, when, in fact, it was Exhibit 27.

text and function, as well as the Commission's decisions. The ALJ's conclusion would effectively remove the term, "legitimate," from the phrase, "legitimate transportation factor," granting blind, unevaluative deference to port authorities, leaving them free to discriminate on any basis, as long as it somehow relates to transportation (i.e. the movement of goods). Moreover, the ALJ's distinction between funding capital improvements and providing operating assistance is fundamentally at odds with the real-world considerations that factor into the decision to offer such benefits.

As to bad faith and prejudice, the ALJ did not address most of AWI's evidence, but did confirm that the PA had boycotted ships destined for AWI's facilities. Nonetheless, again, without any analysis, the ALJ ruled that it was insufficiently "serious" or consequential to warrant any relief under the Shipping Act. As demonstrated below, the ALJ's inference and conclusion are, again, counterintuitive and grossly inconsistent with the record.

Lastly, the entire tenor of the ID raises substantial questions, warranting an order disregarding it. The ID contains no enumerated paragraphs setting forth accepted findings of fact or conclusions of law; it does not distinguish between the two complaints filed by AWI or which "findings" relate to which claims; the central fabric of the ALJ's holdings are largely conclusory, without references to the record; and the ALJ devotes more than two pages to explaining (unconvincingly) how he became involved in an ex parte interaction with opposing counsel and a PA witness just prior to the last trial day and then failed, until after AWI raised it during post-trial briefing, to divulge that it had occurred. AWI is entitled to an order rejecting those aspects of the ID adverse to its position and granting reparations and other relief.[3]

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[3]Proposed findings of fact and conclusions of law were submitted with AWI's briefs and are incorporated by reference here.

EXCEPTION 1
THE ALJ'S RELIANCE UPON UNPLED AFFIRMATIVE DEFENSES NOT RAISED UNTIL AFTER TRIAL TO DEFEAT AWI'S REFUSAL TO NEGOTIATE CLAIM WAS IMPROPER

Section 1709(b)(10) of title 46 of the United States Code, made applicable to MTOs through §1709(d)(3), makes it unlawful to "unreasonably refuse to deal or negotiate."[4] As demonstrated below, the ALJ completely misapprehended the Shipping Act, the decisions construing it and the trial record.

1A. THE ALJ MISAPPLIED THE TEST GOVERNING REFUSAL TO NEGOTIATE

It has always been undisputed in this case that the PA refused to negotiate with AWI (Amer. Br. in Support at 46, citing ¶14 of Respondents' 04-09 Answer). The only issues for trial on this claim were thus: (i) whether the PA provided an explanation; and if so, (ii) whether the explanation was "unreasonable." As the Commission made clear in Canaveral, it is a port authority's "responsibility to present a justification for its actions" and "[the complainant's] burden to prove that the justification presented [] is not a reasonable one ..." Canaveral Port Auth., 2003 WL 723336, *15 (F.M.C.). Canaveral Port Auth., 2003 WL 723336, *15 (F.M.C.).

In its answer and throughout the course of these proceedings, the PA offered a single explanation for its refusal to negotiate. Specifically, the PA asserted in its answer:

> [AWI] has maintained a consistent practice of failing to pay its rent in a timely manner, and of occupying the northern half of Pier 7 without compensating the Port Authority, while its agreement with the Port Authority restricted its occupancy to the southern half of the Pier. [AWI] has breached its lease agreement by making unauthorized use of the premises leased to it by the Port Authority. Attempts of the Port Authority to remove [AWI] from Pier 7 are a direct result of these continuing

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[4] Docking and Lease Agreement by and Between Portland, Maine and Scotia Prince Cruises Ltd., 2004 WL 1895827, *1 (F.M.C.); Canaveral Port Auth., 2002 WL 418056, *1 (F.M.C.).

practices (Answer 04-09 at p. 4).[5]

AWI demonstrated that this single affirmative defense -- that AWI purportedly failed to pay rent and squatted illegally -- had no merit because the purported facts upon which the PA relied to support that defense did not exist at the time of its decision to refuse to negotiate. Specifically, the PA's decision to refuse to negotiate was made by the PA on July 15, 2002, when it passed a Board Resolution expressly prohibiting its employees from negotiating a long-term lease with AWI (Exh. M; also see Tr. 307, with the PA's lawyer so acknowledging). However, the PA repeatedly alleged in direct testimony at trial that AWI supposedly failed to pay rent for Pier 7 beginning in May 2003, nearly a year after the PA had already made its decision (See, e.g., Exhibit 14, p. 2).

Similarly, the PA alleged that AWI began squatting on the northern part of Pier 7 in December 2003. See Spreadsheet attached to Exh. 35, Hacker Direct Testimony. Not surprisingly, the PA's chief witness at trial admitted that she could not recall any specific discussion in 2002 (when the decision not to negotiate was made) about AWI being a supposedly "troublesome tenant" (Tr. 459). In short, the Rent/Squatting Defense was completely bogus.

In the ID, the ALJ agreed with AWI and properly found that the Rent/Squatting allegations were irrelevant because they arose from incidents that purportedly occurred after the decision not to negotiate had already been made, leading him to conclude:

> ... that recent [rent] history does not bear on the question of whether the Port Authority's decision not to negotiate a new lease constituted [an] unreasonable preference or prejudice under the Shipping Act (ID at 5).

The ALJ later stated more directly that the rent dispute was not "a causative factor in that decision at the time that it was made" (Id. at 5).

With respect to the alleged squatting, the ALJ similarly found:

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[5]The PA also asserted a sovereign immunity defense, but properly abandoned it.

> The evidence of what the Port Authority characterizes as squatting comes from the period after the decision not to negotiate a long term lease. Like the rent dispute, the dispute over the northern half of Pier 7 ... does not appear to have been a substantial cause of it at the outset (Id. at 6) (emphasis added).

Having determined that the sole explanation proffered could not possibly have been true -- that the supposed facts supporting the PA's defense (assuming their truth) only came into being after the decision not to negotiate had already been made -- the ALJ should have discontinued his inquiry and analysis. As the Commission explained in Canaveral, supra, it is the respondent's "responsibility to present a justification for its actions." Canaveral Port Auth., 2003 WL 723336, *15 (F.M.C.). Here, the PA failed to sustain its burden of "present[ing] a justification for its actions," inasmuch as it was proven false at trial. Id. The ALJ, in proceeding to consider alternate (and, as discussed infra, unpled and unbelievable) explanations, disregarded Canaveral and misconstrued the Shipping Act. AWI is entitled to prevail on this basis alone.

1B. THE RECORD DOES NOT SUPPORT ANY ALTERNATE EXPLANATIONS FOR THE PA'S REFUSAL TO NEGOTIATE

Even assuming arguendo that it could be appropriate for an ALJ to explore explanations other than those proffered by respondents, he committed clear error in doing so here. The PA never provided any testimony or other evidence indicating that its decision to refuse to negotiate, made by resolution on July 15, 2002, was based upon a concern about AWI's finances. While ordinarily exceptions to the ID require references to the record, here, the basis for the exception is the absence of a record to support the ALJ's decision.[6]

The first time that the PA proffered this alternate explanation was by its counsel in its post-

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[6]And the PA cannot argue in response to this exception that concerns relating to alleged failures to pay rent pertain to financial issues. Even assuming that such were true, any concerns over financial issues that were precipitated by the alleged rent disputes in 2003 still would have occurred more than a year after the refusal to deal had already occurred.

trial brief (PA Post-Trial Br. at 2). The PA's counsel did not cite to testimony or other evidence that the PA, in its decision in July 2002 not to extend the lease, actually relied upon any supposed "concern." Put another way, the PA never showed (or even attempted to show) that the reason for its refusal to negotiate had anything to do with AWI's finances. The sole source of "support" for this proposition came from counsel who argued in his post-trial brief, not that the PA believed AWI was financially incapable, but only that the PA "would be" justified in refusing to extend a lease to a tenant whose prospects were uncertain (Resp. Br. at 2).[7]

The ALJ proffered sua sponte in his ID a series of additional, possible explanations for the PA's behavior that even the PA's lawyer never raised. Specifically, the ALJ asserted that the PA may have been actuated by the desire to change the use of the pier facilities (ID at 11). Again, neither the PA's witnesses at trial nor its attorney during briefing ever suggested alternate uses for Pier 7 as a basis for the PA's actions. Whether the PA "would have been" justified in refusing to negotiate with AWI had the PA desired to change the use for Pier 7 is not the point. Once the Rent/Squatting Defense was shown to be a lie, the ALJ had no authority to begin evaluating other possible defenses. Canaveral Port Auth., 2003 WL 723336, *15 (F.M.C.).

Furthermore, the PA was not considering a different use for Pier 7 at the time it refused to negotiate with AWI. To the contrary, every consultant report prepared for the PA during the relevant time period recommended continuing the mix of container-on-barge and breakbulk cargo operations in Brooklyn -- exactly the operations that American Stevedoring and AWI were already conducting.

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[7] An attorney's post-trial assertions (unsupported by the record) with respect to a port's supposed justification defenses under the Shipping Act cannot be accepted. Ceres, at 29, n. 52 ("Although counsel indicated at oral argument that the MPA was concerned about Ceres' ability to pay liquidated damages when the parties' subsequent disputes arose, there is no evidence of any such concern earlier. Nor did the MPA offer Ceres' financial condition as a reason for denying it the Maersk lease terms") (emphasis added).

See, e.g., Exh. 12 at 2; Exh. 22.[8] Correspondingly, the evidence at trial confirmed that the PA did not desire to change the use of the Brooklyn piers. This included an email from the PA's own spokesman, explaining his comments to a reporter from the Daily News that the PA simply desired to change tenants, by leasing Pier 7 to "marine terminal operators who could continue cargo operations." See, e.g., Exhibit 9 to Scotto Supplemental Testimony.[9] This is consistent with the Request for Expression of Interest ("RFEI") by which the PA invited prospective MTO -- not alternate use -- tenants to lease Pier 7 after AWI's lease expired (Scotto Exh. 8; ID at 9). Accordingly, not only did the ALJ wrongfully distort the analysis under Canaveral by considering unpled, alternate justifications; and not only was there no evidence to support the new alternate explanations; but further, the ALJ's proposed alternate explanations were expressly contradicted by the trial record. The ALJ, in this regard, committed another serious error, of law and in judgment.[10]

1C. THE PA'S ARGUMENT THAT IT "WOULD BE" JUSTIFIED IN REFUSING TO NEGOTIATE CONSTITUTES A BLATANT POST-HOC RATIONALIZATION

By concluding that the PA "would be" justified in refusing to negotiate (based upon unproven financial concerns or unstated desires to use the piers for different purposes), the ALJ effectively gave credence to post-hoc rationalizations for the PA's actions. Parties are not permitted to rely upon after-the-fact explanations, manufactured for purposes of litigation, to justify their conduct

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[8]The cruise ship idea was considered and rejected by the PA after the refusal to deal had already occurred.

[9]All exhibits denoted as "Scotto Exh." refer to those documents submitted along with the Supplemental Testimony of Michael Scotto.

[10]Another possible explanation for the PA's conduct which the ALJ interjected without evidence or even prompting from the PA appears at pages 12-13 of the ID. There, the ALJ comments that the geographic location of facilities often provides a basis upon which to confer leases and other advantages to some MTOs over others (ID at 12). However, once again, neither the trial record nor the PA's post-trial brief contains any such assertions by the PA.

under the Shipping Act. Mar-Mol Co. and Copycorp. v. Sea-land Service, Inc, 1996 WL 734232, *27 (F.M.C.) (reliance upon post-hoc rationalization for imposing a licensing tax rejected); Credit Practices of Sea-land Service, Inc., and Nedlloyd Lijnen, B.V., 1990 WL 427463 (F.M.C.) (granting of preferential credit terms to shippers of certain commodities over others violated the Shipping Act, notwithstanding respondent's "post-hoc rationalization" that such terms were merely a function of price and rate).[11] Therefore, it is irrelevant whether the PA might have been justified in its refusal to negotiate had it harbored concerns about AWI's finances or had it desired alternate uses for the site; what matters is the sole basis upon which the PA refused to negotiate. Once the Rent/Squatting Defense was debunked, any post-hoc rationalizations should have been rejected out of hand.

1D. THE ALJ'S DECISION TO ACCEPT POST-HOC RATIONALIZATIONS WAS COUNTERINTUITIVE

Aside from the legal requirements of the Shipping Act, the ALJ, with all due respect, failed to apply his common sense to this fact situation. The PA, from inception of these proceedings through trial, offered a single explanation -- the Rent/Squatting Defense -- for its admitted refusal to negotiate the extension of a lease with AWI. The testimony of the PA's Manager of Leasing and Property Development was unquestionably the most direct on this point:

> I have been asked to explain why the Port Authority has refused to enter into a long-term lease with [AWI] for the premises known as Pier 7 in Brooklyn, New York. The answer to that question is quite simple: [AWI] has habitually failed to comply with the terms of its lease agreement by failing to pay its rent in a timely manner, if at all, and has occupied the whole Pier 7 in violation of its lease which permitted it

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[11] Port of Ponce v. Puerto Rico Ports Auth., 1990 WL 427465, n. 17 (F.M.C.) ("after-the-fact rationalization" rejected); Matson Navigation Company, Inc.,1990 WL 427460, *28 (F.M.C.) ("Given these circumstances, the post-hoc claim by Goodyear and Paradise of retroactive 'original and persisting intent,' represented by their signing of Matson's certificate, does not match the reliability and probativeness of the evidence presented in Quaker Oats and Armstrong"); 50 Mile Container Rules' Implementation by Ocean Common Carriers Serving U.S. , Atlantic and Gulf Coast Ports, 1987 WL 209053, *70 (F.M.C.) ("These artificial restrictions on containerization and intermodalism are defended by resort to the post-hoc rationalization that they do not affect shippers who can 'truly benefit' from such services. The Commission cannot accept this argument").

to occupy only the southern half of the Pier (Racyznski Direct Testimony at 1, Appendix I hereto).[12]

Then, after trial, the PA's counsel offered, for the first time, the supposed financial "concern" defense, as well as a series of other post-hoc rationalizations in his brief, including the contention that the PA refused to negotiate because AWI did not maintain audited financial statements or declare dividends (Resp. Br. at 2, 5).[13] Given the PA's unswerving commitment throughout these proceedings (at least until after the trial) to its ill-fated and unquestionably-false Rent/Squatting Defense, the ALJ's willingness to consider one of the several alternate explanations inserted by counsel for the first time in a post-trial brief, without any evidence whatsoever that the PA ever considered any of them at the time of its refusal to negotiate, quite simply, makes no sense. Obviously, the PA had been shading the truth (at trial and before) to support its bogus Rent/Squatting Defense theory. The ALJ's willingness to accept an alternate explanation in the face of indisputable evidence that the original had been conjured, respectfully, was counterintuitive.

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[12]Ultimately, the PA withdrew Ms. Raczynski's testimony.

[13]As reflected in AWI's Reply Brief, the absence of declared profits and financial statements does not bear on AWI's financial situation in any way. First, the absence of declared profits in small closely-held companies is hardly unusual. In small closely-held companies, stockholders generally receive their return on investment through salary and bonuses. Federal Trade Comm'n. v. Minuteman Press, 53 F. Supp. 2d 248, 255-56 (E.D.N.Y. 1998) ("Defendants have the better side of the argument ... '[P]rofit in a small closely held business is almost a meaningless term depending upon where we find the officer['s] or owner's salary being taken out. If, in fact, under operating expenses, officer['s] or owner's salary [is listed], then net profit would in fact to a large extent be also the owner's compensation'") (quotation omitted); accord N. L. R. B. v. Savoy Laundry, Inc., 327 F.2d 370, 372 (2d Cir. 1964) (Recognizing that profit levels in a small, family-held business may be determined by the fixing of salaries). Thus, a company, such as AWI, may be valuable for its shareholders (who also work for the company), yet show no "profit" on its balance sheet. Id. Second, the PA's assertion that it was justified in refusing to offer a new lease to AWI because the latter did not have audited financial statements was also utterly bogus. Closely-held corporations are not required to prepare audited financial statements; Cabo Distributing Co., Inc. v. Brady, 1993 WL 313112, *6, n. 2 (N.D. Cal. 1993). Consequently, it is entirely common for such companies not to prepare them. Estate of Obering v. C.I.R., T.C. Memo. 1984-407, 1984 WL 15057 (Tax Court 1984).

1E. THE ALJ COMPLETELY MISCONSTRUES THE JANUARY 2001 PLAN AND ITS SIGNIFICANCE

In the ID, the ALJ concludes that, "AWI's business plan is explicitly based on an ongoing operating subsidy of the barge service. AWI can be profitable with the barge service, cannot be profitable without it, and cannot pay for it from the revenues generated by its business" (ID at 11). As discussed below, the ALJ's statement: (1) is factually inaccurate; (2) is predicated upon the false assumption that AWI and American Stevedoring are the same business; (3) fails to include other pertinent parts of the January 2001 Plan which refute his conclusions; and (4) is utterly counterintuitive. Each of these points is addressed in turn.

First, the ALJ's statement that AWI's business depends upon a container barge is completely inaccurate. AWI does not and did not even use the barge. Cocoa is shipped and delivered to Pier 7 in bags; it is not containerized. Accordingly, the very suggestion that AWI is dependent upon a container barge is absurd.

Second, the January 2001 Plan was prepared for American Stevedoring, not AWI, and by an outside consultant, Paul F. Richardson Associates. For reasons not thoroughly clear, the consultant found it convenient to combine the revenue and expenses of the two firms -- American Stevedoring and AWI into a single, though non-existent, "entity" to which he referred as "AS&W." Of course, American Stevedoring and AWI are "two [] separate corporations, operate independently in many respects, and occupy different facilities, under different leasing arrangements" (ID at 2). Accordingly, however convenient it was for Paul F. Richardson Associates to treat the two as a single entity for purposes of preparing the January 2001 Plan, they cannot be combined for purposes of making findings of fact in these proceedings.

Third, although this combined, non-existent "entity," AS&W, projected a net combined loss

during the years projected (2000-2007) (Scotto Exh. 27 at 14), the January 2001 Plan projects that AWI will **profit** during that same period. Specifically, page 15 of the January 2001 Plan contains an allocation of revenue and expenses by American Stevedoring and AWI by business segment, i.e., containers (for American Stevedoring) and breakbulk (for AWI). As the January 2001 Plan confirms, the breakbulk segment (i.e., AWI's business) projects a $10 million profit in 2000, which was expected to grow steadily to $15 million in 2007. Cocoa was expected to grow 80% over year 2000 volumes in the January 2001 Plan (Exh. 27 at 5, 7). The ALJ inexplicably ignores these aspects of the January 2001 Plan.

The reason that the January 2001 Plan suggests a net loss for the non-existent, combined "entity," though AWI is projected to be profitable, is that, as reflected on page 14 of Exhibit 27, the total expense of the container barge (which would be used in connection with American Stevedoring's container operations, not AWI's) was inexplicably subtracted from both companies' combined revenue. The January 2001 Plan showed that pre-tax profits for the combined segments (container and break-bulk) were not enough to absorb the entire barge expense, despite their own, overall, independent success and profitability (Id.; also see Exh. 27 at 19-20). As such, financial assistance would be needed, but, and this is critical, only if barge service (which American Stevedoring used, not AWI) was to be maintained.

The January 2001 Plan is a business plan pertaining to American Stevedoring's prospective use of barge service; the objective of this document was never addressed at trial. But one thing is clear: it certainly raises no issues with respect to AWI's financial outlook. And whatever American Stevedoring's need for the barge service may have been, it cannot be foisted upon AWI which did not need, and never used, the container barge.

Fourth, even assuming arguendo that it pertained to AWI, there was no evidence that the PA

relied upon the January 2001 Plan or was even aware of it. Obviously, the justification for refusing to negotiate cannot be deemed "reasonable" if the PA was not even aware of the alleged circumstances that purported justification.

Lastly, even assuming arguendo that AWI really needed the container barge (and it did not) and the PA had been aware of the January 2001 Plan (and misunderstood it in the same way as the ALJ apparently did), it would have been irrelevant to the PA's decision to refuse to negotiate with AWI. That is because, despite the January 2001 Plan, the PA still offered American Stevedoring a lease renewal through 2007. In other words, if the projected losses resulting from the barge expense had, in fact, been relevant to the PA's decision not to negotiate, it would never have renewed American Stevedoring's lease -- yet, that is exactly what the PA did. Indeed, were the barge expense a factor, the PA would have been even less likely to extend American Stevedoring's lease inasmuch as American Stevedoring really did use the barge whereas AWI did not. Under the circumstances, to assume that the January 2001 Plan caused the PA concern about AWI's health, but not American Stevedoring's, is, in addition to being unsupported by the record, utterly counterintuitive.

1F. THE ALJ ERRED IN BLINDLY DEFERRING TO THE PA WITH RESPECT TO BUSINESS JUDGMENTS IT NEVER MADE BASED UPON ANALYSES IT NEVER UNDERTOOK

As the Commission noted in Ceres Marine Terminal, Inc. v. Maryland Port Administration, FMC Docket 94-01 (10-10-97), "[b]efore granting deference in any case, the Commission must first assess the reasonableness of the practice involved and then evaluate the grounds articulated to justify the disparate treatment." Ceres, at 33. The Commission stressed that if the port's actions are not unreasonable, then deference might be warranted, but only where the port reached a reasonable decision through its decision making process. Id.

As a preliminary matter, all of the justifications proffered by the PA and the ALJ for the

refusal to negotiate -- the Rent/Squatting Defense, financial statements, alternate uses, and the January 2001 Plan -- have all been completely debunked. The notion of giving deference to decision-making and analysis that the PA never undertook is absurd.[14]

Moreover, simply citing the concept of deference without analyzing the reasonableness of the practice in question represents a disregard of the clear language of the refusal to negotiate clause of the Shipping Act. Indeed, in Ceres, the Commission expressly rejected the concept of blind, unevaluative deference, commenting:

> the MPA want[ed] the Commission simply to defer to its decision of granting preferential lease terms to carriers but not to MTOs, without analyzing the reasonableness of that practice under the 1984 Act. That is not an appropriate use of the concept of deference.

Id. at 33; also see n. 53. The Commission also noted that, "[t]he Commission will not disregard its statutory responsibilities under the guise of granting deference to a port's business decisions." Ceres, at 30. Yet that is exactly what the ALJ did here, as revealed in the following excerpt in which the ALJ sua sponte relied upon geographic location (another unpled "defense") as a supposed basis upon which to refuse to negotiate:

> Balancing factors such as these are among the business decisions that an agency such as the [PA] must make in deciding on the use to be made of its facilities. Such business decisions are not matters for the Commission to second guess unless they rise to the level of a Shipping Act violation (ID at 12).

Aside from the obvious circularity of the ALJ's argument -- business decisions are entitled to deference unless they aren't -- the larger point here is that the ALJ never evaluates whether the "geographic distinctions" (however unproven and unpled) or other so-called "factors" constitute

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[14]For example, the PA never undertook a "particular analysis" of AWI's ability to pay rent on a multi-year lease before refusing to negotiate an extension. Nor did the ALJ undertake to examine whether AWI was able to comply with lease terms offered to other larger MTOs west of Brooklyn. In the absence of this "particular analysis" by the PA, the ALJ was duty-bound to reject any suggestion of deference.

reasonable grounds not to negotiate. He simply proceeded from purported justification (geographic distinctions) to deference, without stopping to consider reasonableness. The same conclusory discussion appears in the final paragraph of the ID (ID at 13). Neither the Shipping Act nor the decisions of the Commission construing it (particularly Ceres) support giving such extraordinary deference to the PA, especially given the absence of any support in the trial record that the PA exercised such judgment in the first instance.

1G. THE REFUSAL TO DEAL WAS NOT REASONABLE, WHETHER BASED UPON ALLEGED FINANCIAL CONCERNS OR "UNIQUE FEATURES" OF BROOKLYN

It is axiomatic that "refusals to deal or negotiate are factually driven and determined on a case-by-case basis." Canaveral Port Authority, FMC Docket 02-02 (2-24-03) at 16. In Canaveral, the Commission distinguished Seacon Terminals, Inc. v. Port of Seattle, 26 S.R.R. 886, 899 (1993), because the port in Seacon had made a lengthy attempt (over a year) to enter into a lease with Seacon, and gave actual consideration to the negotiation. Its eventual lease to another firm with more favorable lease terms was thus deemed a reasonable business decision. Similarly, the Commission deferred to the port's judgment in Chilean Nitrate Sales Corp. v. San Diego Unified Port District, 24 S.R.R. 1314 (1988), because the port changed the use of the space to a different type of cargo handling facility and the complainant had not even attempted to negotiate a lease for space in the new facility. Id. at 1318.

By contrast, in Canaveral, the Commission gave no deference to the port because the decision not to consider the complainant's (Tugz's) request for a franchise was not reasonable. At the port involved in Canaveral, a hearing must be held on an application for a certificate of convenience and necessity to operate a tugboat service. The facts showed that: only one tug company (Seabulk) had been awarded a franchise by the port since 1958; that in 2000, the port in Canaveral denied an

application for a tug franchise filed by Petchem; later than same year, the port denied Tugz's application for a tug franchise; and that even later that year, Tugz filed another application for a tug franchise, but was notified by the port that no hearing would be granted because, since it had just denied Petchem's application for such a service, and nothing had changed, it would be wasteful and duplicative to have a hearing on the Tugz application. The Commission found that these facts established CPA's refusal to deal or negotiate with regard to Tugz's application; the only remaining issue was the reasonableness of CPA's refusal. The Commission found that:

> Based on the totality of the circumstances, CPA's failure to consider Tugz's application is unreasonable, and its justifications (insufficient time, Petchem's objection, and insufficient business at the port) are inadequate. Therefore, we find that CPA violated section 10(b)(10) with regard to Tugz's June 13, 2000, application when on July 19, 2000, it refused to consider it at the July 21, 2000 hearing. Id. at 16, 17.

Like the port in Canaveral, here the PA's absolute refusal to negotiate with AWI, especially after previously promising to conduct such negotiations in November 2002 (Exh. 9 at ¶¶4-5) was not a reasonable business decision. The PA did not consider a lease extension; and it did not offer any reasons to AWI for its refusal to do so concurrent with its the refusal. The PA did not respond to AWI's proposal for different lease terms (price and swing space), nor to AWI's request for a multi-year lease, which was critical to its success as an MTO handling seasonal cargo. There are simply no "facts and circumstances" here justifying the refusal as reasonable, or justifying it as a business decision.

Furthermore, the PA's refusal was not related to any legitimate port commerce goal. In fact, because the PA's commissioners had passed a resolution in July 2002 prohibiting their employees from extending AWI a lease, the PA's representation in November 2002 that negotiations would proceed was simply a bald-faced lie, and further evidence of the PA's unreasonableness.

EXCEPTION 2
THE ALJ'S PROCEDURAL ERRORS CONSTITUTE A DENIAL OF DUE PROCESS

As demonstrated below, the ALJ violated due process by relying upon (A) the Unpled 11th Hour Defense as to which AWI had no prior notice and (B) the January 2001 Plan which he did not admit into evidence until after completion of the post-trial briefing process, thereby depriving AWI of the opportunity to address it.

2A. AWI HAD NO PRIOR NOTICE OF THE PA'S UNPLED AFFIRMATIVE DEFENSE

Rule 74 of the FMC Rules states:

> Replies [to complaints] ... shall be so drawn as to fully and completely advise the parties and the Commission as to the nature of the defense, shall admit or deny specifically and in detail each material allegation of the pleading answered, shall state clearly and concisely the facts and matters of law relied upon, and shall conform to the requirements of Subpart H of this part.

While Rule 74 does not require inclusion of evidence as part of the pleadings process, notice to adversaries and the Commission is paramount. Findings against litigants based upon unpled theories deprive the adverse party of notice and an opportunity to respond, violating due process.[15] Accordingly, the general rule is that failure to plead an affirmative defense results in a waiver of that defense.[16] This is true whether the defense is ultimately raised by the defendant or the court sua

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[15] See Pacific Champion Express Co., Ltd.- Possible Violations of Section 10(b)(1) of the Shipping Act of 1984, 1999 WL 1126489, n. 20 (F.M.C.) ("Principles of due process of law, which the Commission has followed in previous cases, forbid findings of violations of laws that have not been specified in agency pleadings and have therefore not given respondents proper notice and opportunity to defend") citing Ever Freight Int'l Ltd., cited above, 28 S.R.R. at 333 n.3; Kin Bridge Express, Inc.-Possible Violations of the Shipping Act of 1984, 28 S.R.R. 984, 989 n. 2, 991-992 (ID), finalized, August 2, 1999 (F.M.C.); Levatino & Sons, Inc. v. Prudential-Grace Lines, 18 F.M.C. 82 (1974); Martyn Merritt, AMG Services, Inc.-Possible Violations of Shipping Act, 1984, 27 S.R.R. 142 (1995).

[16] Travelers Intern'l., A.G. v. TWA, Inc., 41 F.3d 1570, 1580 (2d Cir. 1994) (defendants' failure to assert affirmative defense until after trial began resulted in waiver and the court's refusal to consider the evidence), citing Sellers v. M.C. Floor Crafters, Inc., 842 F.2d 639, 642 n. 2 (2d Cir.1988); Tufano v. Riegel Transp., Inc., 2006 WL 335693, *6 (E.D.N.Y. 2006) (mitigation defense deemed waived);

sponte.[17]

As discussed supra, the PA never raised the "financial concern" issue in its Answer or at any time during trial, including its direct testimony of witnesses, but instead maintained that its Rent/Squatting Defense represented the "simple" justification for its actions (Appendix 1 hereto). Given the PA's Answer and the testimony of its property manager, AWI had no reason to believe, nor any way to know, that this issue would be raised.

At trial, when the PA first inquired of an AWI witness regarding supposed financial difficulties, we promptly objected, asserting that the questions were beyond the scope of the direct testimony, "the complaint and any defense related to it" (Tr. 211). In response, the PA's counsel implied that the questions were relevant in the context of the alleged rental arrearage, commenting that "the question of how the monies are disbursed within that company is totally relevant to the issue involved in this case" (Tr. 211). Accordingly, AWI had no notice, even at the trial stage, that the PA intended to raise a purported financial "concern" defense. Had the PA desired to amend its pleading, its counsel was duty-bound to make clear at the moment of the objection that it intended to rely upon an unpled defense (which would likely have precipitated further pleadings, discovery and hearings); he never did so.[18]

T.E.A.M. Entertainment, Inc. v. Douglas, 361 F. Supp. 2d 362, 367 (S.D.N.Y. 2005) (defendants' motion for summary judgment based upon "impossibility of performance" defense, denied, as the defense was not pled and thus was deemed waived); 5 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure §1278 (2d Ed. 1990).

[17]Doubleday & Co., Inc. v. Curtis, 763 F.2d 495, 502-3 (2d Cir. 1985) (trial court judge's reliance on the theory of waiver to dismiss plaintiff's case, even though it had not been pled, reversed with instructions to enter judgment in favor of plaintiff).

[18]Opposing counsel probably did not even conceive of the Unpled 11th Hour Defense until the briefing process, inasmuch as he never attempted to elicit any testimony from his own witnesses on this point to show that the PA relied upon AWI's financial circumstances or was even aware of them at the time of the decision to refuse to negotiate.

Although the FMC is an administrative agency, for which rules of procedure may be relaxed to accord substantial justice, AWI was surprised and unfairly prejudiced by the PA's Unpled 11th Hour Defense. By raising it during the post-trial briefing process, the PA deprived AWI of an opportunity to meet this allegation. AWI would have introduced financial data and pages of testimony on this point had we been apprised that it would be an issue; we also would have appropriately conducted discovery prior to trial and cross-examined the PA's witnesses at trial on this point. However, by failing to identify it until after trial, the PA prevented AWI from doing so. Thus, in addition to rejecting it on substantive grounds, the PA's Unpled 11th Hour Defense is procedurally improper, unfairly prejudicial, violative of due process, and should be rejected.

2B. EVEN ASSUMING ARGUENDO THAT THE PA HAD PLED ITS SUPPOSED FINANCIAL CONCERN DEFENSE, THE ALJ ERRED IN FAILING TO INFORM THE PARTIES UNTIL AFTER COMPLETION OF POST-TRIAL BRIEFING OF HIS INTENTION TO ADMIT AN ADDITIONAL 61 EXHIBITS INTO EVIDENCE, INCLUDING THE JANUARY 2001 PLAN

Following post-trial briefing, the ALJ admitted a staggering 61 new exhibits ("Belatedly Admitted Exhibits") into evidence (ID at 2). Among these Belatedly Admitted Exhibits was the January 2001 Plan which formed an essential basis for the ALJ's ID (ID at 10-11, citing Exh. 21).[19]

Generally, where the trial court does not render a decision on the admission of evidence during trial or the post-trial briefing period, it is deemed to have been rejected.[20] The reason that a court's failure to rule upon the admissibility of documents until after post-trial briefing is deemed rejected is fairly obvious; once post-trial briefing has been completed, the parties have no

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[19]In fact, it was Exhibit 27 (not 21) of the 61 Belatedly Admitted Exhibits, addressed on page 2 of the ID.

[20]See, e.g., Cominsky v. Madison Health Care, 2003 WL 22952569, *3 (Ohio App. 11 Dist.), citing Gerl Constr. Co. v. Medina Co. Bd. of Commrs., 24 Ohio App. 3d 59, 65, 493 N.E.2d 270 (1985).

opportunity to rely and comment upon the evidence. Clearly, had the ALJ informed AWI of his intention to admit and rely on the 61 Belatedly Admitted Exhibits, we would have addressed them, as set forth in AWI's arguments under Exception 1. But, just as the ALJ deprived AWI of the opportunity to respond to the Unpled 11th Hour Defense, so too did he deny us the chance to comment upon the 61 Belatedly Admitted Exhibits, including the January 2001 Plan which formed such a crucial aspect of his ID.[21]

EXCEPTION 3

THE ALJ ERRED IN FINDING THAT THE PA'S UNDISPUTED DISCRIMINATION AGAINST AWI WAS PREDICATED UPON A LEGITIMATE TRANSPORTATION FACTOR

3A. THE PA DID NOT MAKE A "BUSINESS DECISION" BASED ON EACH FACILITY'S "UNIQUE FEATURES" AND ADVANTAGES AND DISADVANTAGES

To justify the PA's admitted discrimination, the ALJ was required to rely upon a legitimate transportation factor. Not able to employ the rejected defenses of "failure to pay rent in a timely manner [and] the squatting" (Respondent's Brief at 22), the ALJ focused on the alleged "perennial unprofitability" of AWI (Id). Since the PA did not prove that factor, however, the ALJ substituted his own thinking and, quite frankly, invented a basis for the PA's Unpled 11th Hour Defense that was neither in the record nor addressed by the parties, at trial or in their direct cases.

The ALJ began by observing that "each facility has unique features that result in advantages and disadvantages" (ID at 12). After commenting that the PA's Brooklyn Marine Terminal ("MT") had geographic advantages (proximity to Long Island and New England markets), and disadvantages (limited upland storage space and small size), the ALJ immediately concluded, without discussion,

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[21] Any effort by the PA to resurrect its bogus rent allegations during the exception process should be rejected, inasmuch as they are irrelevant for the reasons made clear herein. Nonetheless, should the Commission desire to examine our response as to the substance of the PA's defense, we respectfully refer to our Reply Brief at 16-30.

analysis, or citation to the record, that "[b]alancing factors such as these are among the business decisions that an agency such as the Port Authority must make in deciding on the use to be made of its facilities. Such business decisions are not matters for the Commission to second guess unless they rise to the level of a Shipping Act violation." ID at 12. The ID then labeled the barge expense a transportation factor that enabled the PA to both discriminate against AWI on the theory that the barge was necessitated by its Brooklyn situs, and to refuse to deal with it as a "reasonable" business decision.

There are many problems with the ID's hypothesis and quick conclusion, that first conflated, and then excused, the PA's refusal to deal and acts of discrimination in one fell swoop. First, there is no evidence in the record that the PA actually balanced the merits and demerits of its Brooklyn MT (or, specifically, AWI's Pier 7 lease terms) with the merits and demerits of Newark, Elizabeth and Staten Island and MTOs' lease terms located there in deciding to negotiate renewal of AWI's lease and to seek other tenants for Pier 7, and to offer multi-year, favorable-price term leaseholds to other MTOs at Staten Island, Newark and Elizabeth (and a multi-year lease to American Stevedoring, AWI's next-door neighbor at Brooklyn MT).

Second, if such a process had occurred, there is no evidence in the record that the alleged analysis devolved to a single expense on the Brooklyn side of the PA's ledger, i.e., the container barge.

Third, there is nothing in the record to suggest why the PA could (or even would) allocate the barge expense to AWI, rather than American Stevedoring, since the PA continued to lease piers to American Stevedoring, which actually used the container barge. Tellingly, the ALJ cited nothing to support the conclusion that the PA thought about and then decided not to rent to AWI based on the merits and demerits of its relative facilities, with respect to size, geography, proximity to

destinations, storage area, the barge expense, or any other allegedly legitimate factor.

Fourth, the PA was seeking firms to operate the Brooklyn MT-- apparently it was willing to negotiate with any firm except AWI. The PA's request for offers from other MTOs in the RFEI contradicts the notion that it had balanced the merits and demerits of its Brooklyn and west-of-Hudson facilities, and made a policy choice adverse to Brooklyn, to which AWI simply fell victim. There was no such weighing process, and no such factor that allegedly supported the decision.

A fifth problem with the ALJ's analysis on this issue is that the PA has, for well over a decade, been the Red Hook-Newark barge operation's biggest supporter, touting its environmental and economic development benefits since 1991 (Appendices II-V).[22] Indeed, the PA has fostered barge service to "inland ports." See e.g., "Port Inland Distribution Network Service Agreement Between the Port Authority of New York & New Jersey and The Albany Port District Commission," Agreement No. 201149 Oct. 15, 2003 (on file with Commission).

3B. THE ID DOES NOT PROVIDE A SUFFICIENT BASIS TO JUSTIFY DISCRIMINATION

AWI demonstrated that the PA made widely disparate capital investments (see, e.g., Appendix VIII and Tr. 736-39, 741-45) amongst similarly situated MTOs, including both capital and other investments at Howland Hook MT, and gave favorable price terms and multi-year leases to "other and larger" MTOs at the PA's Elizabeth, Newark and Staten Island facilities, while discriminating against AWI in lease terms and the refusal to negotiate lease terms. The ID did not,

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[22] In this brief, AWI has cited to several publicly available documents and two news articles (those not available on the web are attached for the Commission's convenience, at Tabs II-VIII). American Warehousing requests that the Commission take judicial notice of the indisputable adjudicative facts in these sources, in accordance with Fed. R. Evid. 201. Judicial notice of additional facts is required because the ID rested on a ground that neither party anticipated or addressed (i.e., the supposed barge expense), and contained presumptions about the PA's thinking about the barge expense as a foundation for the PA's alleged concerns about AWI's finances. AWI is left in the position to have to rebut these erroneous presumptions.

however, discuss AWI's undisputed evidence of discrimination in any detail, aside from acknowledging that the other MTOs were given long-term leases whereas AWI was not, and that the PA has made capital improvements at those container facilities that assisted operations of the MTOs there (ID at 12, 13). The principal proofs AWI submitted to establish discrimination— particularly the favorable treatment of Howland Hook Container Terminal ("HHCT") and discrimination against AWI -- in terms of lease price, lease length and other preferences were glossed over or outright ignored in the ID.

The PA did not undertake a "particular analysis" of AWI's ability to fulfill the terms of a longer lease, or lease terms and price such as those given by the PA to other MTOs. The Commission made clear in Ceres that a port is required to maintain criteria to govern its acts, and that it must apply those criteria evenly. If the port "discriminates," it may only do so after it has made a particular and specific analysis of the disfavored MTO's ability to comply with the terms offered to the favored party. In Ceres, the complainant was able to show that the port did not make a particular analysis of whether Ceres could fulfill the terms of a lease provided to Maersk. Rather, the Maryland port simply assumed that the complainant, Ceres, as an MTO instead of an ocean common carrier, could not guarantee the same number of vessel calls, and used its status as an MTO as a substitute for analysis. Ceres at 33.

3C. THE ID DID NOT MAKE ANY FINDING ON THE WIDELY DISPARATE INVESTMENTS, AND DIFFERENT RENT RATES CHARGED AMONG SIMILARLY SITUATED MTOS

1. Size Does Not Constitute a Valid Transportation Factor By Itself

There is nothing in the Shipping Act or in relevant case law or Commission precedent that suggests that the PA may prefer a similarly-situated MTO merely because it is larger. That kind of preference would not be a permissible one, and would be akin to the cases that rejected preferences

based on an MTO's "status." Ceres Marine Terminal, Inc. v. Maryland Port Administration, F.M.C. Docket 94-01 (10-10-97). Yet the ID, after reciting that AWI had presented evidence that the PA had entered into long-term leases with similarly situated marine terminal operators at other facilities in Newark, Elizabeth and Staten Island, "while it ha[d] refused to make a long term lease, or any lease at all after the short-term lease that expired in 2003, with AWI," went on to state dismissively: "However, they [the other MTOs] are at other and larger facilities" (ID at 12). To be relevant, size must relate to some transportation factor to justify discrimination, and preferences shown must be proportional to the benefit to the port. The Commission's decision in Ceres illustrates the point.

In Ceres, the port had not undertaken a particular analysis of Ceres' ability, but rather attempted to justify the discrimination based on Ceres' status as an MTO (as opposed to an ocean common carrier). The port decided, without any basis, that Ceres' status meant it would not be able to guarantee the same number of vessel calls as Maersk. Here, the ALJ made the same error that the port in Ceres made and which the Commission was called upon to correct; specifically permitted the PA to discriminate (in terms of lease length and price) simply on the basis of AWI's status as the occupant of a smaller facility (ID at 12). Like the port in Ceres, the ALJ here failed to examine whether the particular characteristics of the complainant -- here, size of AWI's facility -- was relevant to a legitimate transportation factor. And as the Commission noted in Ceres, "[s]tatus alone is not a sufficient basis by which to distinguish between lessees." Ceres at 42.

The PA does not even attempt to correlate (in its pleadings, at trial, or in its brief) AWI's relatively modest size (in comparison with other MTOs) with the terms AWI desired. How is it, for example, that the HHCT's size warranted more favorable rent and a longer lease term? HHCT's tenant, New York Container Terminal, and AWI are competitors in the same commodity, i.e. cocoa (Tr. 751; also see Van Tol Examination Before Trial at 126, 135). Without a connection between

size on the one hand and a legitimate transportation factor on the other, the PA's allegation proves nothing under the Shipping Act, warranting entry of judgment against the PA.

The same is true for the so-called "geographic disadvantages" that the ALJ considered relevant. For example, Staten Island's "geographic disadvantages" are at least as problematic as Brooklyn's; Staten Island is an island after all, and is not proximate to any destination except itself. Staten Island's channels require constant dredging and hugely-expensive deepening projects to stay competitive. Its port is only served by one highway, both ends of which are heavily tolled. An investment in track and a lift bridge to connect Staten Island to the mainland by rail was an extraordinarily expensive PA capital project. By comparison, the barge hauling containers from Brooklyn to Newark was simple, and inexpensive.

2. Differences in Lease Price and Length Were Not Related to Any Transportation Factor

In the instant case, there was a great, and unexplained, differential in terms of both lease length and terms between AWI and "other, larger" MTOs without any evidence from the PA that AWI would be unable to accept the same terms. AWI's rental rate (and that of American Stevedoring) was significantly higher than the lease price given to larger western MTOs (See Leases filed and in evidence at the Commission). AWI demonstrated at trial -- indeed, it is indisputable -- that the PA rented space to its other MTO tenants at less money per acre or per square foot than it is currently charging AWI. Indeed, in some instances, the differences are dramatic.

For instance, HHCT was given a lease to operate Howland Hook Marine Terminal for $625,000 in the first year, $1 million in the second year and $7.7 million thereafter. As Howland Hook consists of 187 acres, and there are 43,560 square feet in one acre, the top rent that HHCT pays to the PA is 94.53 cents per square foot annually.

The rents charged by the PA to the MTOs Maher and Maersk at Port Elizabeth, and Port Newark Container Terminal, Inc. at Port Newark Marine Terminal, are also quite low, ranging between $0.67 cents per square foot (Maher) and $1.47 per square foot (Port Newark CT), with the exception of one period in the Port Newark CT lease, from Dec. 1, 2010 to Nov. 30, 2020, where the rent to be charged is slightly higher.

By contrast, the PA charges AWI $1.68 per square foot if AWI is considered to rent the whole pier (269,000 sq. ft) at $33,029.44 per month ($396,353 per year); and $2.68 per square foot if AWI is considered to rent just the southern half of the pier (134,500 sq. ft) at $33,029.44 per month ($396,353 per year); and $2.81 per square foot if the PA were to impose an additional $30,000 charge for AWI's use of the northern half of Pier 7 ($63,029.44 x 12 = 756,353.28 per year divided by 269,000 sq. ft (pier size) = $2.81 per square foot. The PA is charging American Stevedoring a staggering $3.05 per square foot for Pier 8 -- in most instances, more than three times the amount charged HHCT, Maher and Maersk.

The only reasonable charge to AWI for the entirety of Pier 7 (including the southern and northern parts), would be $1.68 per sq. ft. (although that would still exceed every other MTO in the New York district other than American Stevedoring, whose rental charge is even higher.

In Ceres, the Maryland port imposed on Ceres discriminatory rates for its barge service, excessive in comparison to rates provided by the port to Hale for its barge service. The Commission specifically found that the difference in barge rates was not reasonably related to any legitimate goal of the port. In the instant case, ironically, the funding of the barge was undertaken by the PA and other agencies in New Jersey and New York directly in service of a legitimate port goal, i.e., growth in port commerce and reduction of truck trips and air pollution. The ALJ, having never inquired about that goal, cast the barge operation as a liability, and wrongly used it to justify both the refusal

to deal (because of financial concerns) and discrimination. This was error.

Despite this clear evidence of discrimination and preference in connection with PA's lease with AWI, the ID did not discuss it, did not relate discrimination to any legitimate port goal, and did not justify it as proportional, or make any finding about it whatsoever.

3D. THE DISTINCTION BETWEEN CAPITAL AND OPERATING SUBSIDIES IS NOT A LEGITIMATE TRANSPORTATION FACTOR TO JUSTIFY DISCRIMINATION OR REFUSAL TO DEAL

Again relying on Brooklyn's alleged disadvantages, the ALJ rejected the discrimination claim because "the decision to make capital investments at some sites and not to operate a barge from another site are business decisions based on differences in legitimate transportation factors under the third prong of Ceres." The ALJ then concluded that "[t]he decision not to enter into a long-term lease, being based on those transportation factors concerns about AWI's finances due to the barge expense], was neither an undue or unreasonable preference or prejudice nor an unreasonable refusal to deal or negotiate" (ID at 13). The distinction between capital and operating investments is an artificial and flawed one. The ID should be vacated on this point.

1. <u>There is No Precedent Supporting the Capital/Operating Distinction</u>

There is no case law support or FMC precedent for the capital-operating expenditure distinction the ALJ created. We have searched the FMC docket, the Hawkins digest, the Shipping Regulation Reporter, and every treatise we can find. It is too obvious to require citation that ports routinely use a mixture of tariff incentives, rate incentives, operating and efficiency inducements, capital improvements, subsidies, lease price terms and givebacks, and other measures to obtain a desirable market relationship with its MTO lessees that will benefit the port, the operator and the public. <u>See, e.g.,</u> A Report to Congress on the Status of the Public Ports of the United States 1996 -1997, U.S. Department of Transportation Maritime Administration (1997), at App. G (describing

state and local funds used to cover financial shortfalls for economic development projects and detailing eligible outlays (loans, grants, environmental projects, rehabilitation and repair, maintenance (e.g., dredging), accounting, strategic business planning, consulting, site preparation and planning, access to trade information, market studies, etc.) Obviously, ports "subsidize" services to help their MTOs, and make capital outlays.

In Ceres, the Commission assured the shipping community of the ports' continued ability to consider many factors relevant to negotiating a lease. However, the touchstone of parity was preserved: "[W]hen a port establishes criteria for offering incentive rates, it must apply those criteria in a reasonable, even-handed manner." Ceres, at 30.

Here, it may well be that the PA did not apply, or has not even established, transparent criteria for its mix of operating and capital support, rent prices for its MTOs and potential lessees, to assure parity amongst them. Regardless of that probability, neither the PA nor AWI argued that the PA's support for the barge was the death knell of negotiations for a lease extension for AWI at Pier 7. The ALJ simply created this distinction out of whole cloth. Lacking a basis in the record, the proposition presents an insufficient foundation on which to lay down a new rule.

2. Much of the PA's and Other Agencies' Support for the Barge Was Capital Support

The record contains no evidence defining how much of the PA's support for the container barge was operating support versus capital. The PA's own documents show that most of the initial funds, at least, were capital. In the PA's 1994 application for federal Congestion Mitigation and Air Quality ("CMAQ") funds under the Intermodal Surface Transportation Efficiency Act, 23 U.S.C. 101. et seq., ("ISTEA") the PA sought federal funds to make capital investments in the barge: purchase of two barges ($2.4 million); study of costs/benefits of conversion from "lo-lo" to "ro-ro"

operations ($300,000.); operating assistance ($1 million); conversion of barges to ro-ro if shown to be cost-effective ($800,000.); terminal improvements to accommodate ro-ro services in New Jersey ($2 million). Appendix II at 3. Recognizing that their residents would benefit from the barge's operation, the States of New Jersey and New York also contributed millions of dollars to the barge operation, as did the City of New York. See Appendices II at V, Appendix VII (Federal-State Aid Agreement dated Nov. 26, 1999 executed by the PA and NY State Dept. of Transportation).

Congress also invested in the cross-harbor container barge with a $3 million line item appropriation in the 1998 update to ISTEA. See Appendix IV. Congress considered its support for the barge a capital investment and labeled it as such. See Appendix IV. "Transportation Equity Act for the 21st Century, Public Law 105-178, 105th Congress, at 112 Stat. 263, No. 162. New York, Capital improvements for the Red Hook Barge in NY/NJ for the Port Authority of NY/NJ-- $3 million."

The New York Metropolitan Transportation Council Transportation Improvement Programs, in its five year capital programs (FFY 1998 – 2002, p. 378; FFY 2002 – 2004, p.240) also detail the provision of several millions of dollars for engineering and construction funds for the barge. Appendix V.

In any case, there is a thin line between capital and operating support by agencies. Most capital projects need years of planning, engineering, environmental and other kinds of support before a shovel hits the ground. The distinction between what is and what is not a capital expense is not a distinction that this Commission should begin to parse to ferret out preference and discrimination—not on this record, anyway. In the instant case, the PA was able to obtain significant federal, state and local support to contribute as "subsidy" to cover the shortfall in the container barge operation, which the PA started even before American Stevedoring or AWI rented at Brooklyn MT, as a way

to induce ships carrying containers to call at Brooklyn, and to reduce truck congestion and air pollution.

3. Operating Support Need Not Be Ephemeral and It Was Not Here

Even if the Commission were to consider the ID to state a new rule, the discussion of the "fundamental difference" between capital improvements and operating "subsidy"[1] was deeply flawed. The ALJ in his ID stated that, "Capital improvements like cranes and warehouses are an enduring asset of a facility, continuously available to service customers and, to the extent they increase capacity, can increase business, to the benefit of the operator, the port, and the public." ID at 13. A legitimate distinction must be preceded by a comparison of costs and benefits, however. Even a rudimentary analysis shows that a port's investment in operating expenses are not ephemeral and can yield significant long-lasting benefits.

An expenditure for a capital improvement, such as a crane, can be converted to an annual operating cost by amortizing the cost of purchasing and installing the new crane plus debt service over time, i.e., either the term of the debt or the crane's useful life. Likewise, an investment in operating expenses over time can be converted to present value to determine the capital cost equivalent today. For instance, if a port authority set aside $140 million today in a bank, annuity or bond that paid it five percent annual interest, the investment would produce $7 million annually which the port could dedicate to defray operating expenses of a useful service like a cross-harbor barge. (Seven million dollars was the approximate annual cost of the Red Hook-Newark barge, according to the January 2001 Plan.) Alternatively, a port authority could obtain bank or similar financing at five percent for 20 years for a $140 million capital investment in cranes or a warehouse. That instrument would entail an annual fixed charge rate of 8%, implying an annual amortization cost of $11.2 million, and a total cost by the end of the term of $225 million. With a shorter term,

the total cost would be less, but still more than the original $140 million purchase price. Even if the port paid $140 million cash for the cranes and warehouse, and did not finance the expense, it would still cost the port $140 million at present value.

From an economic perspective, then, an investment in operating expenses need not be "ephemeral." Indeed, when properly financed through a set aside of a given sum which generates interest to cover annual expenses, such an investment would be more or less perpetually available to the port. The governance advantage of such a plan is that the income as well as the principal (if it so chose) is perpetually available to the port to fund other projects, products and services. This type of investment allows the port greater flexibility in changing investment objectives as circumstances merit over time. The capital investment on the other hand is a sunk cost. The capital sunk can restrict choices a port can make, going forward, for commerce, for the benefit of MTOs and the public.

In this ID, there was not even an apples/oranges comparison of costs or benefits of investment choices— nor did the ALJ ask the parties to address the subject at any time, in any forum. The distinction, and preference for one investment vehicle over another, is invalid. This capital vs. operating issue was simply not anticipated or addressed by any party, and the ID's reliance on it is, frankly, unjust. The ID should be vacated on this point.[23]

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[23]Driven by lawsuits, environmental agency pressure and public opinion, ports are making investments, including in operations and services, to reduce air pollution from port operations, especially fine particulate pollution exhausted by heavy diesel trucks leaving the port gate. See, e.g., "Clearing the Air, Southern California's Ports Coordinate Effort to Reduce Pollution from Ships, Trucks, Trains," The Journal of Commerce, vol. 7, no. 28, pp. 24-25. Appendix VI.

Fine particulate pollution, which essentially is diesel soot from trucks, is both toxic and carcinogenic. See, e.g., California Air Resources Board, *Diesel Risk Reduction Plan,* October 2000. (30 epidemiological studies found that diesel exhaust increases cancer risks; a 2000 California study found diesel exhaust to be responsible for 70 percent of the cancer risk from air pollution.) See also, "Health Effects of Diesel Exhaust Particulate Matter:, California Air Resources Board, http://www.arb.ca.gov/research/diesel/dpm_draft_3-01-06.pdf. Researchers have found that for each decrease of 1 microgram of soot per cubic meter of air, death rates from cardiovascular disease, respiratory illness and lung cancer decrease by 3.

4. The PA's Support for the Barge Was a Reasonable Business Decision, Not a Transportation Factor Justifying Discrimination

The PA's and other agencies' financial support for the barge was not a transportation factor that formed the basis of the discrimination in lease rates and the length of the terms offered to similarly situated MTOs. The PA's support for the barge may be one thing it has done to level the paying field between MTOs west of the Hudson and American Stevedoring, an MTO at its Brooklyn MT. It is supremely ironic that this one benefit to Brooklyn would be cast in the ID as justification for discrimination against a Brooklyn MTO, AWI, *because* of its location.

Moreover, it is preposterous that the ID would focus on the small annual barge investment that benefits an MTO in Brooklyn as a legitimate transportation factor justifying discriminatory lease terms, rate and length against AWI and preference for other MTOs, as well as a refusal to enter into a new lease, especially when 1) the MTO in question, AWI, does not use the barge; 2) the PA itself was a strong supporter of the container barge in particular and barges to "inland ports" generally; 3) the PA renewed the lease of the principal beneficiary of the barge investment, American Stevedoring, which uses the barge; and 4) the capital and operating investments by the PA in all three transportation access and egress modes – water, highway and rail— that benefit MTOs at Elizabeth, Newark, and Staten Island dwarf by billions of dollars the annual Brooklyn-Newark container barge

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At the Ports of L.A. and Long Beach, cleaner air will be achieved through both capital and operating investments including, "a mix of tariff requirements, terminal lease requirements, financial incentives and environmental impact reports." "Clearing the Air," Journal of Commerce, id. at 25. At New York, financial assistance for the barge was part of the mix of investments, until the operator could sustain the cost of the barge on its own. Where ports undertake progressive measures to lessen the negative externalities of operations, as the nation's largest ports (New York, and LA/Long Beach) have, this Commission should be reluctant to issue that tolerate discrimination against MTOs that happen to benefit from such measures because of the expense associated therewith. Adoption of the ID on this point would be very unfortunate. There is nothing about the Shipping Act that requires a port to ignore its other environmental and intermodal transportation objectives in making its business decisions, and here, the PA did not ignore those objectives, but pursued them. The Shipping Act merely requires non-discrimination amongst MTOs once those other policy choices and investment decisions have been made.

operating cost. See Appendix VIII.

The PA's decision to financially support the cross-Harbor barge as part of its Brooklyn industrial and economic development plan was, quite simply, a reasonable business decision. As Inga Nelson, the PA's program manager noted, the barge was "a critical service to the success of industrial re-development on the Brooklyn waterfront." Appendix III, cover letter. Investments in cleaner port operations, capital or operating, enhance business. As the Journal of Commerce (July 10, 2006) article "Clearing the Air," at p. 25, noted, "[I]mporters, warehouses, marine terminals and railroads have a stake in finding some way to reduce air pollution from trucks. If the problem isn't solved, they won't be able to expand, and about two dozen port and near-dock rail expansion projects that are currently on hold for environmental reasons will never be built."

Indeed, this Commission held in Reduction in Rates, Pacific Coast-Hawaii, 8 F.M.C. 258 (1964), that a business starting a new mode cannot expect to attract all of its customers immediately and that there will be a ramp-up period, when the rates charged (there, for a barge operation) are "noncompensatory" in the sense of not producing a net profit. The Commission said that, " If new transportation experiments are to be adequately tested they must be given sufficient time to realize their inherent advantages. To compel them to fully compensate the owner from the first days of their operation would doom many promising services to the shipping public to an early death." Id. at 264. Benefits to be realized by the port and the public are often calculated to arrive years after the benefits to the operator are given-- benefits provided to induce growth in business.

The ALJ got it exactly wrong in the Initial Decision. What the ALJ labeled a reasonable business decision (the refusal to deal) was not reasonable (or even explained), and what the ALJ labeled a legitimate transportation factor (the barge subsidy) to justify discrimination was instead a reasonable business decision. The barge expense *qua* transportation factor was the only pier to

which the ID moored the PA's alleged financial concern defense. If the transportation factor is invalid, the foundation the ID rested both the finding of non-discrimination and reasonable refusal to deal, respectively, was also invalid. AWI respectfully requests reparations specified in the Complaint be awarded, and that the PA be required to enter into good faith negotiations for a long term lease.

EXCEPTION 4
THE ALJ'S REJECTION OF AWI'S UNFAIR PREJUDICE CLAIM CONSTITUTES CLEAR ERROR

The Shipping Act prohibits MTOs, including the PA, from imposing "any undue or unreasonable prejudice or disadvantage" upon another MTO. 46 U.S.C. §1709(d)(4). At trial, AWI submitted massive evidence of undue prejudice and disadvantage imposed upon it by the PA. As demonstrated below, the ALJ erred: by failing to address the lion's share of this evidence; in providing almost no analysis for his conclusions; grossly underestimating the impact of the PA's conduct, most particularly the shipping boycotts (explained infra); and misapprehending the record on the timing of the PA's actions.

4A. THE ALJ FAILED TO ADDRESS THE LION'S SHARE OF THE EVIDENCE OF UNDUE PREJUDICE AND HARASSMENT SUBMITTED BY AWI

As discussed infra, AWI showed that the PA stopped a series of ships from docking at Pier 7, resigning AWI to sending letters to officers of the PA or commencing lawsuits (the "PA's Ship Boycotts"). In addition, AWI proved that the PA:

(i) refused to provide swing space to AWI, despite that granting swing space is "a standard practice in the industry" (ID at 5) and had been provided by the PA to the predecessor tenant at Pier 7, Commodities Storage, Inc., from which AWI had acquired its lease (Moving Post-Trial Br. at 14, citing Exh. 2 at ¶7 and Exh. 4 at ¶¶3,6, and 7);

(ii) promoted other MTOs, while simultaneously refusing to market Pier 7 and AWI's facilities (AWI's Post-Trial Brief at Point I(C)(2), pp. 41-42, citing Tr. 730, 745, 750-51,

758);

(iii) restricted AWI's access to, and in several instances actually evicting AWI from, its own AWI's facilities (AWI's Post-Trial Reply at Point I(D)(3), p. 23, citing Exh. 2, ¶¶13, 14, 18 and Tr. 173-77);

(iv) delayed reimbursement of AWI for capital construction of the fabric tents (or tension membrane structures) which caused: (i) substantial areas within Pier 7 to remain fallow and unusable; and (ii) AWI to suffer serious cash flow difficulties (AWI's Post-Trial Br. at 23-27; also see Tr. 368-373);

(v) engaged in an aggressive dual media and whisper campaign, asserting to AWI's customers and competitors (not to mention the general public) that AWI was being evicted and would be going out of business (Post-Trial Reply at 7, 18);

(vii) limited access to the piers by reducing the area around the active cargo sheds that may be used for standby/staging/parking of trucks, containers and other vehicles, allowing only one truck at a time to pick up cargo (Exh. 2, ¶13);

(viii) repeatedly filed bogus landlord-tenant proceedings, designed to harass AWI, coerce it into accepting unfavorable conditions, and force it out of business (Moving Post-Trial Br. at 9, 12, 20-22; also see Exh. 33 at ¶¶53, 60, 70; Exh. D); and

(ix) reneged on its promise to negotiate a long-term lease, consigning AWI to an unstable and unworkable month-to-month tenancy (Tr. 381, 509) which crippled its ability to attract customers and increase volume (Tr. 173-76; Exh. 8 ¶6; Exh. 12, ¶¶3-7; Exh. 33, ¶¶6-10, 13; Exh. 2, ¶11; see generally, Proposed Findings of Fact, ¶¶40-42).

The above-recited acts of harassment and prejudice were done in addition to the "ordinary" acts of discrimination AWI proved, including:

(i) offering long-term leases to HHCT, Maersk, Maher Terminals, Carco, and even the Albany Port District, but refusing to provide any long-term lease to AWI (Moving Post-Trial Br. at 30-32, 43, citing Leases on File with Commission, ID at 2);

(ii) offering rents to other MTOs in amounts substantially below those charged to AWI and, in several instances, charging other MTOs approximately one-third of the amounts charged to AWI (Id.); and

(iii) performing capital improvements at HHCT and at other MTs in the hundreds of millions of dollars or more, while refusing even to provide similar improvements for AWI or even comply with its contractual obligations to reimburse AWI on a timely basis for erection of tension membrane structures on Pier 7 (Moving Post-Trial Br. at 40-42, citing Tr. 738-39, 742, 745, 747, 748, Exh. 20 at ¶20, and Post-Trial Exh. C).

At trial, the PA did not attempt to refute this evidence, ostensibly because it could not. Rather, the PA simply argued that it was "irrelevant anyway" (Tr. 740). The ALJ apparently agreed, inasmuch as, on pages 9 and 10 of the ID, he rejected AWI's arguments. Importantly, however, the ALJ only addressed the PA's Ship Boycotts and the whisper campaigns. For example, the ID contains no analysis regarding: (i) the PA's refusal to reimburse AWI for construction of the tension membrane structures (which resulted in AWI's partial eviction from its space and caused financial turmoil for AWI); or (ii) the PA's refusal to permit access to AWI's own facilities, including, inter alia, access to its facilities by trucks (supra).[24] The PA's campaign of harassment created a siege-like atmosphere (Tr. 370) which the ALJ largely ignored.

4B. THE ALJ ERRED IN MINIMIZING THE EVIDENCE OF THE PA'S SHIP BOYCOTTS

At trial, and in AWI's direct case, AWI proved that on December 12, 2003, the PA refused to permit a ship carrying cargo earmarked for AWI to berth at Pier 7 (Tr. 375; Exh. 9). The PA acknowledged that, after AWI wrote letters demanding that the PA reconsider its refusal, the PA contacted its legal counsel (Tr. 671-672). One of the PA's witnesses acknowledged during her testimony that it was only after AWI commenced an Article 78 proceeding in New York Supreme Court and the Judge "ordered you [the PA] to let the ship dock" that it was permitted to do so and discharge its cargo (Tr. 512). This process of refusing access, followed by intervention by the courts or the PA's attorney directing that the ship be permitted to berth, occurred again and again, including, inter alia: in January 2004 (Exh. 39), on August 10, 2004 (Exh. 40) and in June 2005 (Tr. 379, 380). In the ID, the ALJ properly found that the PA had disrupted "vessel operations," but

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[24]Although the ALJ covers several of the other aspects of AWI's proof in the context of discrimination, he does not address discuss whether, independent of discrimination, the PA unduly prejudiced or unfairly harassed AWI.

concluded that they were "not so serious as to constitute Shipping Act violations"(ID at 9). To support this conclusion, the ALJ explained:

> In each case [of ship boycotting], either through prompt intervention by the court or on advice of counsel, the PA relented and permitted docking (Id.).

In effect, the ALJ minimized the impact of the undisputed boycotting of ships from the public berth at AWI's facility. The trial record confirms, however, that the impact of the PA Ship Boycotts was massive. Specifically, AWI's Director of Operations, Matt Yates, testified in excruciating detail, precisely why the boycotting of ships constitutes an unqualified disaster for an MTO, involving "millions and millions of dollars" and causing a rippling effect throughout the commodities market (Tr. 375-76). He explained that the inability to berth at Pier 7 would: suggest to customers that AWI is not in control of its facilities (Tr. 376); create the perception that AWI could not be relied upon to meet its contractual obligations (Tr. 377); harm AWI's relationships with its customers, including Blommer Chocolate, one of America's largest suppliers of chocolate (Id.); harm its customers' relationships with their own customers (Id.); and deprive shippers of the opportunity to unload their cargo, thereby requiring them to travel to their next destination with full hold, resulting in fuel depletion and delays in connections (Id. at 378). Although minimizing in the ID the impacts of the PA's Ship Boycotts, the ALJ spoke confidently during the trial at their obviousness, and attempted to stop Mr. Yates' testimony, commenting that the consequences are "fairly obvious, even to someone not as familiar with the industry" (Tr. 378). However obvious during the trial, the ALJ erred in overlooking these impacts in the ID.

Furthermore, the remark that boycotting of multiple ships was alleviated through "prompt intervention of the court" -- as if to suggest that the undertaking was facile and uneventful -- fails to reflect real-world considerations implicated in such a litigation. Hiring a litigator, filing a lawsuit,

preparing and approving pleadings and affidavits, and seeking an injunction, all while a ship filled with cargo is virtually adrift in the harbor, as clients call, demanding an explanation, is catastrophic. And the PA's Ship Boycotts occurred repeatedly. To minimize the PA's Ship Boycotts reflects a complete misapprehension of this issue.

4C. THE ALJ ERRED IN DISREGARDING THE PA'S COERCIVE EFFORTS TO FORCE AWI TO WAIVE ITS RIGHTS

The timing of the PA's Ship Boycotts almost always coincided with an attempted eviction or other act of harassment by the PA. And the PA's Ship Boycotts were not the only retaliatory tactic in which the PA engaged. The PA also used AWI's legitimate rent escrow, and request for credit against sums owed by the PA to AWI, to actually evict AWI from Pier 7, not "merely" to refuse to negotiate lease terms.

In Ceres, supra, the port refused to offer Ceres certain barge rates unless Ceres dropped its state court suit, and also refused to bargain with it for the same reason. Specifically, the MPA's director told and wrote to Ceres that it "could not negotiate with Ceres when Ceres owed it over half a million dollars." Ceres at 33. The letter the port director sent was characterized as a "formal demand for payment." The Commission went on to point out that this formal demand for full payment, on which the MPA was conditioning its negotiations, was followed by a letter to Ceres that "also indicated MPA's unwillingness to negotiate with Ceres unless and until Ceres paid the outstanding amounts allegedly due." The Commission found this tactic to constitute part of the MPA's unlawful conduct in that case. Id. at 33.

The port's unfair and conditional bargaining in Ceres is the same as the PA's here. The PA served on AWI a formal rent demand dated November 13, 2003 in response to AWI's letter, dated October 31, 2003, requesting a credit for September and October 2003 rent based on the money that

the PA owed AWI in reimbursement for the agreed-upon capital construction work. The PA's rent demand in November and follow-up eviction action in December 2003, coupled with the PA's ship boycott on December 12, 2003, were pure retaliation for AWI's request for credit (which the PA never disputed) against rent.

4D. THE ALJ ERRED IN MISAPPREHENDING THE TIMING AND NATURE OF THE PA'S MISCONDUCT

The ALJ concluded that the PA's conduct could not constitute unfair prejudice or harassment directed at AWI because: (i) the timing of the PA's misconduct post-dated the refusal to deal and is therefore, according to the ALJ, irrelevant; and (ii) no alleged efforts have been directed at American Stevedoring, AWI's sister company, and, this, therefore according to the ALJ, shows that the PA demonstrated no animus toward AWI. The ALJ was wrong on both points.

First, simply because the refusal to negotiate occurred on July 15, 2002 does not mean that the PA did not engage in conduct thereafter to harm AWI. Indeed, the undisputed evidence confirms that the PA did precisely that. For example, the PA's Ship Boycotts began in December 2003, as did the eviction proceedings. It is entirely unclear why the ALJ concluded that, in effect, the undue prejudice and harassment claims were necessarily and inextricably linked with the refusal to deal claim. They are not. In fact, the prohibitions against unreasonable refusals to deal and negotiate are covered under an entirely separate provision of the Shipping Act. Compare 46 U.S.C. §1709(b)(10) with (d)(4). The ALJ, in rendering the undue prejudice and harassment claims dependent upon the refusal to deal claim, completely misapprehended the proof and the Shipping Act.

Second, the suggestion that the PA treated American Stevedoring well is false. American Stevedoring's lease for Pier 8 ($3.05 per square foot) is, in most instances, three times the amount charged to the PA's other tenants: HHCT, Maersk and Maher. Moreover, American Stevedoring has

been regularly threatened with non-renewal of its lease which expires in March 2007. See, e.g., "City's Storied Cargo Ports are Suffering a Sea Change," Community Gazette for District 38, 3/7/06; also see Press Release of Jerrold Nadler, dated April 19, 2006 ("The City Administration and Port Authority have stated their determination to close the Red Hook Cargo facility").[25] The PA also forced American Stevedoring out of its tenancy at Pier 11, purportedly to make room for cruise ships at that location (Exh. 2 at ¶¶2-4); however, the PA subsequently confirmed that "Pier 11 will play no part in the cruise ship operation" (Id. at ¶6). Although American Stevedoring received a lease on Pier 7 through March 2007, it is grossly disingenuous to suggest that the PA has excluded it from its harassment and other bullying efforts at the Brooklyn Piers.

Lastly, even assuming arguendo that the PA had treated American Stevedoring well, that does not, in effect, give the PA a free pass to unduly prejudice AWI, its sister company. The PA's violations of the Shipping Act must stand or fall on their own; put more directly, the harassment of AWI cannot be disregarded merely because the PA acted less egregiously to an affiliate.

EXCEPTION 5
THE DISCOVERY PROCESS WAS FUNDAMENTALLY FLAWED AND THE ALJ BELOW CUT OFF DISCOVERY PREMATURELY

AWI made appropriate discovery requests of the PA during the pendency of the 04-09 complaint, and then made additional discovery requests once the 05-03 complaint was filed. Shortly before the final discovery deadline, after the Commission had issued subpoenas to non-parties in connection with the "study" the PA undertook in 2003 to assess uses of the Brooklyn waterfront, those non-parties provided several boxes' worth of discovery that confirmed AWI's suspicion that the PA had withheld a great deal of discoverable and relevant documents, including over 60 e-mails that were received or generated by PA employees, reports about Brooklyn's breakbulk operation, and

[25] www.house.gov/list/press/ny08_nadler/killvankullredhook041906.html.

other relevant documents relating to animus, and refusal to deal, and perhaps discrimination. The PA frequently defended on the grounds of privilege, but it never produced to our knowledge an appropriate privilege log in accordance with Fed. R. Civ. P. 26(b)(5), despite a request for same. The PA took advantage of the lax discovery procedures below to suppress and withhold documents. The PA's Brooklyn MT manager, for instance, Arie Van Tol, who confirmed the PA's preferences in terms of HHCT, admitted at trial that he had not produced any emails at all, as was mainly true of Peter Zantal, the PA's Manager of Strategic Analysis and Industry Relations, Ernesto Butcher, the chief operating officer, and others. Our exception to ALJ Schroeder's denial of our motion to compel and motion for additional discovery was preserved, and continued throughout the trial. If the Commission remands this case for the taking of additional evidence, AWI requests that discovery be permitted to allow present counsel to pursue what prior counsel was not permitted to pursue.

EXCEPTION 6

THE APPEARANCE OF IMPROPRIETY TAINTS THE ALJ'S FINAL DETERMINATION, WARRANTING AN ORDER BY THE COMMISSION DISREGARDING THE ALJ'S RECOMMENDATION

At footnote 23 of AWI's post-trial brief in support of the Complaint, we reluctantly articulated our concern that, unbeknownst to AWI or its counsel, the ALJ had conducted an ex parte inspection of Pier 7 with the PA's attorney and their witness, Arie Van Tol, who testified later that day. Upon receiving no response from the PA with respect to this issue in the Respondents' Opposition brief, we further explored it in Reply, commenting that the Rules of the Commission strictly prohibit ex parte communications.

In response to AWI's Moving and Reply Briefs on this issue, the ALJ, in the ID, explains in painstaking detail how he came to be on the same train as opposing counsel from Washington, DC to New York, the same subway from New York to Brooklyn, and ultimately, in the same automobile

from the subway stop to the location of the trial. Leaving aside the issues of coincidence with respect to the train ride from Washington, DC (which we are prepared to accept), and the subway ride (which we are also prepared to treat as innocent), the four troubling issues relate to: (i) the ALJ's decision to accept a car ride with a trial witness; (ii) the unnecessarily circuitous route taken by the car, through Pier 7, from the subway station to the trial after the parties had discussed at trial whether an inspection would be appropriate and ultimately determined that there would be no inspection; (iii) the ALJ's interaction with the PA's witness concerning trial issues that occurred during the ride; and most importantly, (iv) the ALJ's failure to disclose what had transpired, despite that the configuration of Pier 7 and the prospect of an inspection was raised several times later that day (on and off the record) during trial. Each of these issues is addressed in turn.[26]

First, with respect to the car trip, we have been unable to find a single reported decision in which a judge accepted a ride with one of the attorneys appearing before him and a witness who was scheduled to testify at a trial later that day. Perhaps it is that these circumstances so clearly present an appearance of impropriety that no court has had occasion to rule on the issue. The closest fact pattern to that presented here appears in Johnson v. Bagley, 2006 WL 2165685 (S.D., Ohio). In Johnson, the Court ruled that the judge's decision to travel with a juror on the way to trial constitutes an "undeniable appearance of impropriety." Id. at *4. If anything, the circumstances presented in these proceedings create an even greater appearance of impropriety, insofar as the ALJ traveled with a witness whose credibility he was ultimately required to weigh.[27]

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[26]Before proceeding, we wish to emphasize that it is with great discomfort that we have been forced to raise these issues; and we certainly do not wish to malign the ALJ or Mr. Donovan, each of whom was personable throughout the trial.

[27]Worse, the ID confirms that the witness, Mr. Van Tol, was one of two PA passengers (in addition to counsel) in the car. In other words, Mr. Van Tol did not have to be present; the other PA employee could have driven without Mr. Van Tol being present, which would have, to a degree, lessened the appearance issue.

Second, as for the route taken, maps of the area confirm that the PA's circuitous path through Pier 7 raises additional questions. The route from the Clark Street subway station to the PA's offices in Brooklyn (where the trial took place) is direct and simple. The attached street map confirms that the simplest route is to travel to Henry Street (via Willow and Pierrepont Streets), then to Atlantic Avenue, and then a left turn down Columbia Street until the PA's offices are reached on the right (Appendix IX hereto, with green highlighting to reflect this route). Instead, the PA's witness, Mr. Van Tol (who was driving), declined to make the left on Columbia, instead traveling excessively west of the PA's offices, taking the ALJ off public roads and through a security gate ("Security Gate") to enter Pier 7 (which would have been unnecessary had they taken Columbia), and causing them thereafter to traverse an obstacle course of equipment, containers, and other accouterments of AWI's break-bulk operations (Id. with pink highlighting to reflect the circuitous route).

Signs in the area clearly identify Pier 7. Indeed, the ALJ acknowledged that, during the trip, he came to "assume[]" that the route taken by the PA would traverse Pier 7 (ID at 7). Accordingly, the ALJ knew he was approaching Pier 7. While the decision to take the circuitous route raises significant questions as to Mr. Van Tol's motives and the PA's tactics generally, it is the fact that the ALJ failed to request a different route, despite his awareness that he was about to enter the subject facility in the presence of a witness and an attorney for only one side, that raises serious concern. Once he saw the signs for Pier 7, the ALJ could easily have requested whether another route existed (and indeed, as discussed supra, a far more direct approach would have rendered the view entirely unnecessary);[28] however, the ALJ inexplicably failed to do so. The ALJ compounded this error in judgment by failing to handle the witness interaction issue, as discussed below.

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[28]Indeed, Mr. Van Tol of the PA, a manager of the Brooklyn Marine Terminal for many years, surely knew how to get directly to the place of trial.

It bears emphasis that the PA's witness, Mr. Van Tol, attempted to provide to the ALJ certain details concerning Pier 7 and its facilities, in one instance pointing out certain of Pier 7's tension membrane structures -- the circumstances, construction and configuration of which were featured prominently at trial (ID, 7). The ALJ indicated that he "did not turn to look"at the tension membrane structures (Id.). He also claims to have turned his head to the left as he was traveling through Pier 7 to avoid viewing its facilities (Id.).[29]

Aside from the obvious weakness of the "I didn't really look" defense, the appearance issue arises, not so much from the witness's effort to give an ex parte tour, but from the ALJ's failure to instruct him not to discuss the case. The ALJ also makes no mention in his decision of directing opposing counsel to instruct his witness not attempt to discuss the case or interact with him in any way. The ALJ's failure to give an instruction raises a serious issue which, when coupled with the circuitous route and the ALJ's declination to request an alternate path, creates the appearance of impropriety.

Even if all of the above could be dismissed, the ALJ's failure to disclose the incident (the travel, the ex parte inspection, and the witness interaction) until issuance of the ID, only after we first raised the issue, is, frankly, unfathomable. The ALJ contends in his ID that he thought Ms. Bauer (one of AWI's lawyers) was present during a discussion of his travel arrangements; Ms. Bauer was not present for any such discussion and was as shocked as Mr. Hiller was upon learning of these revelations. Nonetheless, even assuming arguendo that Ms. Bauer had been present for a conversation concerning the ALJ's travel arrangements, that would not explain why the ALJ failed

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[29]Ironically, if traveling through Pier 7 on the route the ALJ described, turning his head to the left would have resulted in his viewing of, among other things, the tension membrane structures, equipment, breakbulk goods, and other aspects of Pier 7's operations. Turning his head accomplished little or nothing at all.

to inform AWI that Mr. Van Tol had engaged him in conversation concerning a disputed issue at trial; it also would not explain why the ALJ failed to inform AWI that he had been driven through Pier 7 on the way to the trial location.

This is especially egregious in view of the fact that the subject of an inspection of the Pier 7 was addressed later that afternoon and neither the ALJ nor the PA mentioned it. In this regard, the record is as follows:

> JUDGE KRANTZ: ...I'll want to briefly address the issue that was left open [sic] of a view [of the facility]. I -- I expressed my general reluctance, but left the option open at our discussions on Tuesday and Wednesday. And I -- well, if both sides want a view, we don't have a controversy. And if either side wants a view, we don't have a controversy. If one side wants it and another opposes, then we have a controversy. So, does either side wish to propose a view of Pier 7?
>
> MR. DONOVAN: I'm comfortable with the record, Your Honor (Tr. 774).[30]

Thereafter, the ALJ proceeded to explain why a view was not necessary, but again never disclosed that he had just been to Pier 7 and spoken with a witness with regard to the facility. In this regard, the ALJ stated:

> Yes, it just occurred to me, listening to Mr. Hacker's testimony, that the issues that are in dispute aren't really susceptible to learning anything from seeing the facility (Tr. 775).

It is inconceivable that the above discussion on the record did not precipitate the disclosure of what had transpired on the way to the trial.

The ALJ attempts to dismiss this entire issue by referencing his conclusion that, since squatting was ultimately rendered irrelevant (because the Rent/Squatting Defense was bogus), the configuration of Pier 7 could not have weighed on his determination. The ALJ's implication misses two larger points. First, the ALJ did, in fact, discuss in the ID the configuration of Pier 7 relative

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[30]AWI's counsel indicated that he, too, was comfortable with the existing record (Id.), obviously not being aware that the ALJ and opposing counsel, along with a witness had already viewed the facility.

to other facilities, thereby placing his "viewing" directly in issue.[31] To suggest that the make-up of the facility only relates to the squatting issue is incompatible with the ID itself. Second, whether or not the viewing or interaction had an impact on the discrete issues to which he refers is not as important as the fact that the incidents occurred and he failed to disclose them. Indeed, had we not raised the issue in our papers, the ALJ might never have disclosed it to anyone.[32]

Lastly and no less importantly, viewing the ID through the lens of the ALJ's conduct, as reflected in this Point IV, confirms precisely why it was necessary to address it. As shown supra, the ALJ agreed (ostensibly because he had no choice) that the PA refused to negotiate and that its only pled defense -- the Rent/Squatting Defense -- could not possibly have been true. Nonetheless, he recommended ruling in favor of the PA largely based upon the Unpled 11th Hour Defense that the PA was supposedly concerned about AWI's finances -- this, even though no one from the PA actually testified that such was the reason for its refusal to negotiate, and despite that the January 2001 Plan upon which the ALJ relied was not even admitted until after completion of post-trial briefing and, in fact, had never been mentioned at trial (other than the PA's attorney's comment that it was "totally irrelevant"). The ALJ never requested additional testimony or briefing with respect to the January 2001 Plan even though he had to know he was basing the lion's share of his conclusions upon that document - - one as to which no one had provided any testimony whatsoever and which neither side even mentioned during the briefing process. While not intending to cast aspersion upon the ALJ, these circumstances suggest an effort by the ALJ to "go out of his way" to

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[31]For example, the ALJ commented that Red Hook has "the disadvantages of small size and limited upland storage area" relative to other facilities" (Id. At 12).

[32]This failure to disclose appears to be in violation of Rule 502.11(d) which requires the ALJ to "promptly" reveal any ex parte communication to the Secretary of the Commission. According to the online docket, no disclosure to the Secretary was ever made (at least until the ID).

find in favor of the PA. Whether or not that actually occurred, the ALJ's conduct and his subsequent decision create the unmistakable appearance of impropriety. His ID, therefore, insofar as he recommended ruling against AWI on the ultimate issues litigated, should be disregarded.

CONCLUSION

For the reasons stated, AWI is entitled to an order, disregarding the ID and granting reparations and other relief requested in the Complaints. And, as set forth at the top of this brief, oral argument is respectfully requested.

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